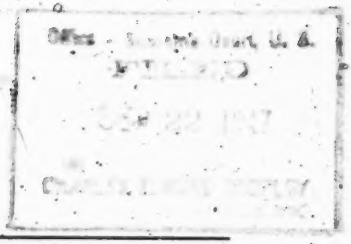

No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

MARGARET E. SHERRER, Petitioner

v.

EDWARD C. SHERRER

ON WRIT OF CERTIORARI TO THE PROBATE COURT FOR THE COUNTY OF BERKSHIRE, COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

FREDERICK M. MYERS
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Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts (R. 58-65) is reported in 1946 Advance Sheets (Mass.) 1193.

Jurisdiction

The rescript below was entered November 4, 1946 (R. 57). The petition for writ of certiorari was filed January 22, 1947, and was granted March 3, 1947. The jurisdiction of this Court is invoked under § 237 (b) of the Judicial Code, 28 U.S.C.A. § 344 (b).

Questions Presented

1. Whether, in the absence of fraud and collusion, a final divorce decree obtained in a State Court proceeding in which both parties have appeared, filed pleadings and participated personally and by counsel, can be held invalid by another State in a suit between the same parties in view of the Full Faith and Credit Clause, Article 4, § 1 of the United States Constitution, and provisions of the Federal Statute 28 U.S.C.A., § 687.

2. Whether, under the Full Faith and Credit Clause and the Federal Statute above referred to, a party to a divorce action in one State, who has appeared generally and has specially denied the question of the Court's jurisdiction, and has later participated in the action personally and by counsel without appeal, can relitigate the question of the first Court's jurisdiction in a proceeding in another State.

3. Whether, after a party to a divorce action has appeared generally in that action, filed an answer specially denying the other party's domicile, and later taken part in the proceedings without appeal, the refusal to hold that the questions of domicile and jurisdiction have become

res judicata to him on the ground that there was no actual contest on that issue, constitutes a violation of the Full Faith and Credit Clause and the provisions of the Federal Statute.

4. Whether the failure of the Court of one State to apply the criteria and standards of proof laid down by this Court as applicable to the final decree of another State, constitutes a violation of the Full Faith and Credit Clause and the provisions of the Federal Statute.

5. Although the point is not raised in the opinion of the Court below, the case may be considered to raise the question, by implication, whether the policy of Massachusetts as set forth in its Statute, G. L. (Ter. Ed.) c. 208, § 39 justified it in refusing to give Full Faith and Credit to the Florida decree.

Statutes Involved

The pertinent provisions of 28 U.S.C.A. § 687, and of the Massachusetts Statute. G. L. (Ter. Ed.) c. 208, § 39 are set out in the Appendix, p. 22

Statement

The Sherrers were married in New Jersey in 1930 and lived together in Massachusetts until April 3, 1944. Two children were born of their marriage. The wife's mother had been committed to a mental hospital, and the husband repeatedly taunted the wife with references to her mother's condition and with threats to have her committed (R. 15, 52, 62). She became nervous and upset, a

sinus condition became worse and her doctor advised that she go to Florida (R. 12, 16). The wife consulted Massachusetts counsel as to her rights, and as to the possibility of her establishing a residence in Florida and getting a divorce there. She was advised it was possible to get a divorce in Massachusetts or to take up residence in Florida and get one there (R. 16).

On April 3, 1944, the wife took the two minor children to Florida. On arriving at St. Petersburg, April 4, 1944, she and the children occupied a rented apartment for three weeks; thereafter, they successively occupied two rented furnished cottages in that city (R. 24, 53, 60), the children being with her until November 19, 1947, and the wife continuing occupancy until February 5, 1945.

The wife secured employment in St. Petersburg beginning the next month after her arrival and was continuously employed until she left in February 1945.

She placed the older child, then ten years old, in school in St. Petersburg within two weeks after she arrived in Florida and kept her in school as long as the child was in Florida (R. 21, 33).

On July 6, 1944 the wife consulted a Florida attorney and filed a libel for divorce on the grounds of extreme cruelty. The husband on July 10, 1944, received formal notice to appear by August 7, 1944. He retained Florida counsel, who entered a general appearance and filed an answer, which, among other things, denied the allegations as to residence. The husband came to Florida November 9, 1944. On November 14, there was a hearing in the

divorce proceeding, during which the husband's attorney was present, but the husband remained "in a side room." The husband's attorney read into the record a stipulation of parties which had to do with the custody of the children, the wife testified. The husband entered the court room and was questioned as to his ability to look after the children, and thereupon the hearing closed, except for a deposition which was to be presented in corroboration of the wife's testimony. On November 19, the husband returned to Massachusetts with the children. On November 29, the deposition was filed and final decree was entered awarding the wife a divorce and awarding custody as stipulated. On December 1, the wife married one Phelps. She and Phelps thereafter resided in St. Petersburg in the cottage which she had formerly been occupying with the children. Phelps had been in Tampa, Florida, since April 14 (R. 40) and was working in a lumber yard there. At the time of his marriage to the petitioner it was the intention of both the wife and Phelps to make their home in Florida (R. 17, 37). The wife and Phelps continued to reside in St. Petersburg, she working as a waitress in a restaurant, and Phelps at a lumber job, until they were summoned back to Monterey on or about January 28, 1945 by a letter advising Phelps of the serious illness of his father (R. 34, 38, 63). On receipt of the letter they came back to Monterey and went to the house in which the petitioner and respondent had been living prior to April 1944, arriving February 5, 1945. About February 12, 1945, before the father's condition had changed for the better and while the wife and Phelps were

still in Monterey, Phelps was served with a writ in an action for alienation of affections and loss of consortium brought by the respondent, Sherrer, ad damnum $15,000., returnable to the Berkshire County (Massachusetts) Superior Court April 2, 1945 (R. 39, 61). The wife and Phelps decided to remain in Massachusetts until the case could be tried. They had retained the St. Petersburg cottage at the time of leaving for Monterey and did not give it up until about a month after the summons was served in the alienation suit (R. 19, 24, 25).

The wife represented to the respondent, both at the time of her leaving for Florida in April 1944, and by letters sent to him while she was there up to April 20, that she was only in Florida for a visit. Her reason for such representations was that she feared he would hold her in Massachusetts if he knew her true intent (R. 31) and her fear of his having troopers after her in Florida (R. 31). On April 20 (Exhibit 5, R. 11, 56) she wrote him she was not coming back, she would not live with him (R. 11).

On June 28, 1945, the husband brought an action in the Berkshire County Probate Court against the wife alleging he was living apart from her for justifiable cause in that the wife, in order to evade the laws of Massachusetts, obtained an invalid divorce decree in the State of Florida and entered into a void marriage with one Henry Phelps, that said divorce and subsequent marriage were invalid, illegal and void. The Berkshire County Probate Court decreed that the husband was living apart for justifiable

cause as set forth in the petition. From that decree the wife appealed to the Massachusetts Supreme Judicial Court, which sustained the decree.

Specification of Errors

The Court below erred:—

1. In permitting the respondent to relitigate the question of the jurisdiction of the Florida Court in spite of his having participated personally and by counsel in the Florida proceedings.

2. In holding, in spite of *Davis v. Davis*, 305 U.S. 32, that a matter covered by a judgment is not res judicata as between the original parties to that judgment, so long as it was not 'actually litigated.'

3. In failing to test the Florida judgment on the theory that it must be supported unless lacking in foundation.

4. In holding that the burden of proving the validity of a foreign divorce decree was on the person relying thereon.

Summary of Argument

A. Failure to give the effect of an estoppel by judgment to a judgment rendered in a sister state is a denial of Full Faith and Credit to that judgment within the provisions of the Constitution.

B. As between the parties, a judgment has finality not only as to every matter which was offered to sustain or defeat the demand but also as to every ground which

might have been presented, and the requirement by the Massachusetts Court that there be 'actual' litigation of the issue is unjustifiable.

C. The doctrine of res judicata applies no less to a question of domicile than to any other question which may be involved in a case.

D. Refusal to test the validity of a judgment of a sister state in accordance with the principles and criteria laid down by this Court is a denial of Full Faith and Credit to that judgment.

E. The provisions of the Massachusetts Statute (G. L., c. 208, § 39) afford no justification for denying Full Faith and Credit to a divorce decree rendered in Florida to parties formerly domiciled in Massachusetts.

Argument

A. The failure of the Massachusetts Court to give effect as res judicata to the estoppel by judgment of the decree rendered against the respondent in the Florida Court constitutes a violation of the Full Faith and Credit Clause.

In *Bates v. Bodie*, 245 U.S. 520, a husband had sued his wife for divorce in Arkansas, alleging cruelty. The wife had filed an answer and a cross complaint accusing him of cruelty and seeking alimony. The husband's suit was dismissed and a divorce and alimony granted in the wife's suit. The decree recited that the judgment was rendered by the husband's consent on condition there be no appeal. The wife later sued the husband in Nebraska alleging

that he was the owner of Nebraska land and that because the Arkansas Court had no jurisdiction to take the Nebraska land into consideration, the decree did not bar the second action. The Court said at Page 526, "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided." On p. 531, the Court further said, "We think, therefore, that due faith and credit required by the Constitution of the United States, was not given to the decree."

B. As between the parties, a judgment has finality not only as to every matter which was offered to sustain or defeat the demand but also as to every ground which might have been presented, and the requirement by the Massachusetts Court that there be 'actual' litigation of the issue is unjustifiable.

1. Both on principle and by a long line of decisions of this Court, it is clear that the doctrine of res judicata operates through estoppel by judgment as to every matter which might have been presented in the suit, whether actually litigated or not. *Cromwell v. County of* Sac, 94 U.S. 351; *Grubb v. Public Utilities Commission*, 281 U.S. 470, 479; *Chicot Drainage District v. Baxter State Bank*, 308 U.S. 371, 375; *Heiser v. Woodruff*, 327 U.S. 726, 733; *New York vs. Halvey*, 91 L. Ed. Adv. Ops. 793.

Cromwell v. County of Sac, supra, is one of the cases most frequently cited as to the effect of a prior judgment between the parties as to every matter which might have been litigated. The question before the Court related to whether a plaintiff, who had brought one action on certain County bonds and had been found not to be a holder before maturity for value, was barred by that judgment from showing in a second suit on other bonds of the same series that he had acquired these other bonds for value before maturity.

The Court (Field, J.) said on p. 352, "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly

accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

In *Grubb v. Public Utilities Commission*, *supra*, this Court (VanDevanter, J.) said at p. 479, "He (the appellant) was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. . . . As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

In *Chicot County Drainage District v. Baxter State Bank*, *supra*, the question presented was whether bondholders, who had been parties to a proceeding in which they had not raised the question of the constitutionality of a pertinent statute, could not later relitigate the question merely because the statute had been held unconstitutional subsequent to the judgment in the first suit. Chief Justice Hughes said at p. 378, "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and

in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'"

In *Heiser v. Woodruff*, *supra*, this Court did inquire into the extent to which a claim had been litigated in Bankruptcy Court but, in its opinion, said, "In general, a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

In *New York v. Halvey*, *supra*, this Court (Douglas, J.) stated that the general rule is that this command (the Full Faith and Credit Clause) requires the judgment of a sister state to be given full, not partial, credit in the State of the forum.

§10 of the Restatement on Judgments relates to Res Judicata and Jurisdiction over the Subject Matter. Comment c. states that where the question of jurisdiction is not actually litigated, the rule stated, namely, that the matter is res judicata as between the parties, is still applicable, "the court and the parties assuming that it has jurisdiction. The rule is not applicable if there is no litigation of any issue, even though the defendant by his

appearance or otherwise is subject to the jurisdiction of the court. It is applicable, however, if issues are litigated in which the jurisdiction of the court is assumed though not contested."

The illustration given relates to a case where the constitutionality of a statute was assumed and not contested. The party to the action is "precluded by the prior judgment" from later attacking the constitutionality of the statute in a second action even though subsequent to the first action the highest court had determined the statute to be unconstitutional.

2. If by litigation a party can be put in a position where as to him the jurisdictional question has become res judicata (as to which see discussion under C *infra*) there is no reason why he may not be put in that same position by his consent. Judgments based on consent have been enforced under the Full Faith and Credit Clause in several cases which have come before this Court. *Bates v. Bodie* (*supra*), 245 U.S. 520, 531; *Yarborough v. Yarborough*, 290 U. S. 202; *Davis v. Davis*, 305 U.S. 32.

In *Bates v. Brodie*, *supra*, at p. 531, the Court points out that the judgment had been rendered with the consent of the parties and said it was admitted that such consent was sufficient to give jurisdiction on which to base an alimony decree.

In *Yarborough v. Yarborough*, *supra*, the question was whether a Georgia consent judgment making settlement

of alimony and providing for the support of a minor child could be upset in North Carolina at the suit of that child. The child had not been a party to the Georgia suit but the mother had participated in it. The Court (Brandeis, J.) said at p. 210, "By the Georgia law, a consent (or other) decree in a divorce suit fixing permanent alimony for a minor child is binding upon it." On p. 211, the Court said, "Moreover, this is not a case where the scope of the jurisdiction acquired by the Georgia court rests upon the effectiveness of service by publication upon a non-resident. Mrs. Yarborough filed a cross-bill, as well as an answer; and in the cross-bill prayed 'that provision for permanent alimony be made for the' support and education of Sadie. Thus the court acquired complete jurisdiction of the marriage status and, as an incident, power to finally determine the extent of her father's obligation to support his minor child."

In *Davis v. Davis*, *supra*, the question was whether, after a wife had specially pleaded lack of jurisdiction of the Virginia Court on the ground that the husband had no domicile there, the District of Columbia could disregard the Virginia judgment. The Court held that under the Full Faith and Credit Clause, the judgment was binding upon the wife. At p. 42, the Court (Butler J.) points out that, while the wife's appearance was special for the sole purpose of challenging jurisdiction, the fact was that she had participated in the litigation and acquiesced in the orders of the court relating to the merits. The Court says at p. 43, "Considered in its entirety the

record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

The effect of filing a general appearance is no less a consent to the Court's determining the jurisdictional question than as if the matter had become the subject of judgment through litigation or by special consent.

It has always been clear that a person may subject himself to the jurisdiction of a court by consenting to that court's exercising jurisdiction over him. Restatement, Judgments, § 18, 19.

If a special appearance, as in *Davis v. Davis, supra*, is sufficient to give the Court jurisdiction to issue a decree binding on the parties, there is no reason for holding that a general appearance will do anything less. Such a holding would put the party who determined, after examining into the question of domicile, that there was nothing to be gained by contesting that point, in a better position than the party who fought the question of domicile from the beginning of the litigation and through every court.

3. The proposed test as to 'actual' litigation is unsound because of its ambiguity and uncertainty. If it means there must be a forensic contest, the question immediately arises as to how far that contest must go before it becomes 'actual'. Must both parties introduce evidence? Must both attorneys examine and cross-examine? Must the losing party exhaust his rights of appeal? Will the fact

that there is a stipulation of parties as to some phase of the case remove the case from the 'actual' litigation category? These are not idle questions. If the suggested test is to be imposed someone must decide, and there must be some standard for decision, as to when a case falls on one side or the other. What about the situation arising when counsel for a party concludes as the result of his investigation that as to some issue, perhaps that of domicile, the petitioner's story is well founded, and therefore he will contest only on some other ground. Will the Court conduct its own investigation and substitute its judgment as to how the case should have been handled for that of counsel?

Will this Court examine the full record in every case which comes up under the Full Faith and Credit Clause? If the whole question of violation of the Full Faith and Credit Clause depends on whether there has been actual litigation, the losing party will have the right to have this Court determine that question.

Petitioner submits that there is no justification for this Court to depart from the clear and definite rules long established as to estoppel by judgment in favor of some uncertain standard which will be determined by a different yardstick by every Court in which the problem is presented.

C. The doctrine of res judicata applies no less to a question of domicile than to any other question which may be involved in a case.

American Surety Co. v. Baldwin, 287 U.S. 156,166; *Davis v. Davis*, 305 U.S. 32; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78.

As this Court said in *Treinies v. Sunshine Mining Co., supra*, "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties."

In the opinion of the Court below, it is said "The ruling in *Davis v. Davis*, 305 U.S. 32, was based chiefly upon declarations in cases not involving the marital relation and in which the paramount rights of the State were not involved." (R. 64); Mass. 1946 Adv. Sheets, 1200. Inasmuch as the *Davis* case was itself a case involving the marital relation, the statement quoted can only be interpreted as questioning the wisdom of making the rule as to res judicata apply to jurisdictional matters, litigated or not, in divorce cases. There is, of course, no ground for such a distinction. If jurisdiction depends on domicile, domicile can be determined as readily in a divorce action as in any other litigation.

D. By its refusal to test the validity of the Florida judgment in accordance with the principles and the criteria laid down by this Court, the Massachusetts Court has denied Full Faith and Credit to the Florida judgment.

In considering the Florida divorce, the Court below did not give to that decree even as much weight as it would have given to a jury verdict. The only question as

to weight of testimony posed by the Court's opinion is whether there was sufficient in the evidence to justify the findings of fact made by the Judge of the Probate Court. The opinion says, "The judge was not required to accept the respondent's (wife's) testimony." (R. 63), and again, "An examination of the record shows that the judge's finding that the divorce was uncontested was not plainly wrong." (R. 64).

Obviously the Court below applied the rule it previously laid down in *Bowditch v. Bowditch*, 314 Mass. 410 at 415, 416, "One who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicile at the time the divorce relied upon was granted in the foreign state." This action is in square conflict with the rule as laid down by this Court. In *Williams v. North Carolina*, 325 U.S. 226 at 233, this Court (Frankfurter, J.) said, "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owned by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicile and therefore a want of power in the court rendering the judgment. What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached."

One will search in vain in the record in the case at bar for any indication that inquiry was made into the question whether there was "want of foundation for the con-

clusion" that the Florida Court reached. Had that test been applied instead of the test whether there was any scintilla of evidence to support the Massachusetts Probate Court Judge's finding, there could be no doubt that the record furnished ample evidence to support the Florida decree. By every test of domicile, petitioner had acquired a domicile in Florida prior to the time of her seeking a divorce there. Her residence, her job, her religious affiliations, her children's schooling and her intent all coincided to make St. Petersburg her home. Even if the petitioner's acts after obtaining the divorce be examined as bearing upon her intent at the time of her coming to Florida, then even by that test, the fact that the petitioner stayed in Florida for two months after the divorce was obtained is evidence to support the Florida domicile. There was no sufficient evidence in the case to sustain the overturning of the Florida decree if the burden of proof had been placed on the husband.

E. The Massachusetts Statute, General Laws (Ter. Ed.) c. 208 § 39, does not justify denying Full Faith and Credit to the Florida decree.

The reference in the opinion below to the "paramount rights of the State" (R. 64) may possibly be taken as meaning that Massachusetts refused to recognize the Florida decree because of the provisions of the Statute above referred to. If that view be taken it is submitted that such action was in direct conflict with the decisions of this Court.

In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 440, it was held that the Full Faith and Credit Clause required the enforcement in Lousiana of a judgment recovered in Texas under the Texas Workmen's Compensation Law by a Louisiana resident, even though the Louisiana Statute would have given the plaintiff employee a more liberal award than that given by the Texas Court.

In *United Commercial Travelers v. Wolfe*, 91 L. Ed. Adv. Ops. 1245, it was held that a South Dakota statutory provision invalidating every contractual attempt to shorten the period of limitations must yield to an Ohio judgment based on a requirement in a society's constitution that action must be brought within six months.

In *Yarborough v. Yarborough*, *supra*, at p. 219, this Court said "due process of law will not permit a state, by its judgment, to inflict parties 'with a perpetual contractual paralysis' which will prevent them from altering outside the state their contracts or ordinary business relations entered into within it."

To hold that the Massachusetts statute above referred to is in itself sufficient ground to bar the petitioner from relying upon the Florida decree is to inflict the "contractual paralysis" condemned by the above opinion.

Conclusion

The petitioner asks that this Court lay down the doctrine that estoppel by judgment applies to make a divorce decree res judicata as to the original parties and their privies in every case in which both parties appear and

participate in person or by counsel to the same extent that any other decree becomes res judicata, and that the anomalous requirement that there be actual litigation before a litigant is bound by a judgment be held to be unsound and meaningless. It is submitted that this Court is the one which should declare what the Federal law as to estoppel by judgment is. To give it the meaning contended for will cure the situation described by Mr. Justice Black in his dissenting opinion in the second *Williams* case, *supra*, at p. 264.

Once a definite rule is established by which one can know that a divorce is valid or invalid, we shall have stability in place of the present chaos and the Full Faith and Credit Clause will become a nationally unifying force as to divorce decrees rather than a force nationally distruptive.

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Appendix

28 U.S.C.A. § 687 ..... And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Massachusetts, G. L. (Ter. Ed.) c. 208 § 39 ..... A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth.